

No. 12,933

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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WILLARD A. WINHOVEN,

*Appellant,*

vs.

EDWIN B. SWOPE, Warden, United  
States Penitentiary, Alcatraz, Cali-  
fornia,

*Appellee.*

BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for a writ of habeas corpus (Tr. 65, 79). The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in which he contended that he was denied the effective assistance of counsel (Tr. 1-38), the Court below issued an order to show cause (Tr. 39), the appellee, the Warden of the said penitentiary, filed a return to order to show cause (Tr. 40-44) which the appellant traversed (Tr. 49-52), and the Court below thereupon ordered a writ of habeas corpus to issue (Tr. 57-58), which was duly issued (Tr. 59-60). Thereafter the appellant was produced before the Court pursuant to the said writ and the appellee filed a return to the writ of habeas corpus (Tr. 63-64), which the appellant traversed (Tr. 61-62). Thereupon the matter was submitted and the Court below entered the following "Order Dismissing Petition for Writ of Habeas Corpus":

"Upon the entry of appropriate Findings of Fact and Conclusions of Law,

It is hereby ordered that the Petition for Writ of Habeas Corpus be, and the same is, dismissed, and the Writ of Habeas Corpus is discharged:

The respondent may have ten days within which to submit his proposed Findings of Fact and Conclusions of Law.

Dated: February 13th, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."  
(Tr. 65.)

Thereafter the Court below entered the following "Findings of Fact and Conclusions of Law":

"The above entitled cause having been submitted by the parties hereto, Willard A. Winhoven, Petitioner herein, appearing in proprio persona, and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and Joseph Karesh, Esq., Assistant United States Attorney for the Northern District of California, appearing as counsel for respondent, and evidence both oral and documentary having been introduced, and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT.

### I.

That petitioner elected to proceed without counsel in these habeas corpus proceedings after he had been advised that the Court would appoint counsel for him if he so desired.

### II.

That petitioner is a citizen of the United States.

### III.

That petitioner is detained by the respondent, Edwin B. Swope, as Warden of the United States Penitentiary, at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in

criminal cause numbered 26543-W by the United States District Court for the Northern District of California, Southern Division, hereinafter called 'the Trial Court', on the 4th day of September, 1942, and under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 7785 by the United States District Court for the District of Kansas, First Division, on the 11th day of February, 1947, and transfer order dated the 20th day of March, 1947, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America.

#### IV.

That the Trial Court had jurisdiction over the petitioner and the offense alleged in the indictment returned against him in said criminal cause numbered 26543-W.

#### V.

That prior hereto petitioner herein filed in the Trial Court a motion to vacate judgment in said criminal cause numbered 26543-W, which was denied on the 21st day of June, 1949; that the petitioner did not take an appeal from the order of the Trial Court denying the said motion to vacate judgment; that the grounds set forth in said motion to vacate said judgment and sentence were in substance identical to those alleged in the petition for writ of habeas corpus filed herein.



## VI.

That the indictment in said case numbered 26543-W was returned by the Grand Jurors of the Trial Court on the 8th day of February, 1939; that the indictment in said criminal cause numbered 26543-W charged the petitioner and a co-defendant, John E. Sivyver, with unlawfully and feloniously assaulting and robbing a Post Office clerk of mail matter, money and other property of the United States and putting his life in jeopardy by use of a dangerous weapon.

## VII.

That the sentence imposed by the Trial Court against the petitioner and his co-defendant in said criminal cause numbered 26543-W, made and entered before the Trial Court on the 4th day of September, 1942, provided for the imprisonment of the petitioner and his co-defendant in a United States Penitentiary for a period of 25 years; that the sentence imposed by the United States District Court for the District of Kansas, First Division, in said criminal cause numbered 7785, made and entered on the 11th day of February, 1947, provided for his imprisonment in a United States Penitentiary for a period of five years; that the period of imprisonment imposed by the United States District Court for the District of Kansas, First Division, was ordered to run consecutively to the term of imprisonment imposed by the Trial Court; that petitioner has not as yet served the sentence imposed upon him by the Trial Court in said criminal cause numbered 26543-W; that with good time credits earned, the petitioner has served the sentence imposed upon

him by the United States District Court for the District of Kansas in said criminal cause numbered 7785; that the petitioner makes no attack against the validity of the sentence imposed against him by the Kansas Court, before which Court he was indicted and convicted of the offense of escape; that at the time the said indictment was returned against the said petitioner in said criminal cause numbered 26543-W the petitioner was in custody of the authorities of the State of California; that the first time the petitioner and his co-defendant appeared in the courtroom in response to the indictment returned against him in said criminal cause numbered 26543-W was on the 5th day of August, 1942, when he and his co-defendant were brought before the Court pursuant to a writ of habeas corpus ad prosequendum directed against the Warden of the California State Penitentiary, Folsom, Represa, California; that at the time the petitioner and his co-defendant first appeared before the Trial Court in said criminal cause numbered 26543-W the United States was represented by Valentine C. Hammack, Esq., Assistant United States Attorney; that at this proceeding on the 5th day of August, 1942, the said petitioner and his co-defendant were informed of the return of the indictment against them, were asked if they were the persons named in the said indictment, and upon answering that they were and that their true names were as charged, they were informed of the nature of the charges against them, stated that they understood the same, and waived the reading of the indictment; that during the proceedings on the arraignment the Court advised the petitioner and his co-defendant that before

pleading to the indictment they were entitled to be represented by counsel and that if they had no means to procure counsel the Court would appoint counsel to represent them; that the petitioner and his co-defendant having been asked whether they desired counsel assigned by the Court, replied that they were without means to employ counsel and that they desired to have the Court appoint counsel for them, and the Court thereupon appointed James B. O'Connor, Esq., as attorney for the petitioner and his co-defendant; that the Trial Court then ordered the case continued to the 8th day of August, 1942, to enable the petitioner and his co-defendant to plead, and thereupon remanded the petitioner and his co-defendant, in default of bail, to the custody of the United States Marshal for the Northern District of California.

### VIII.

That the Court, of its own volition, appointed able and competent counsel, James B. O'Connor, Esq., to represent the petitioner and his co-defendant; that petitioner's statement that the Assistant United States Attorney recommended to the Trial Court that James B. O'Connor, Esq., be appointed as counsel for the petitioner is not true.

### IX.

That thereafter, on the 7th day of August, 1942, the petitioner and his co-defendant appeared in Court represented by James B. O'Connor, Esq., the case, by consent of counsel being advanced from the 8th day of August, 1942; that at the request of Mr. O'Connor the matter was continued to the 22nd day of August, 1942, for entry of plea,

and thereafter to the 29th day of August, 1942; that on the 29th day of August, 1942, the petitioner and his co-defendant again appearing in Court with their counsel, James B. O'Connor, Esq., pleaded not guilty to the charges contained in the indictment and trial before a jury was set on the 1st day of September, 1942; that during the period from the 5th day of August, 1942, to the date of the entry of plea, and thereafter until the beginning of, and the culmination of the trial, Mr. O'Connor conferred on numerous occasions with the petitioner and his co-defendant.

### X.

That on the 1st day of September, 1942, the case proceeded to trial, the petitioner and his co-defendant being represented by counsel, James B. O'Connor, Esq.; that after the jury was duly impaneled the case was continued to the 3rd day of September, 1942, at 10:00 A.M.; that on the 3rd day of September, 1942, when the trial was first resumed, the co-defendant, Sivyver, for the first time requested permission to appear on his own behalf, and the permission of the Court was granted; that the petitioner did not then, nor had he prior to that time made such a request; that after counsel for the Government made an opening statement on behalf of the United States Mr. O'Connor waived an opening statement on behalf of the petitioner, and the co-defendant waived his opening statement; that after two witnesses had been called on behalf of the United States and testified the co-defendant moved the Trial Court to set aside its formal order allowing him to appear on his own behalf and to reappoint Mr.

O'Connor as his attorney, and after hearing, the said request was granted; that the Government and the defense rested at the close of the 3rd day of September, 1942, after the petitioner and his co-defendant had taken the stand and testified in their own behalf; that on the 4th day of September, 1942, Mr. O'Connor advised the Trial Court that the petitioner and his co-defendant desired to represent themselves in any further proceeding before the Court, and this request was denied; that up to this point petitioner had not protested the appointment of Mr. O'Connor as his counsel, nor had he, up to this time, requested that he appear on his own behalf; that thereafter the Assistant United States Attorney argued on behalf of the Government, Mr. O'Connor argued on behalf of the defendants, the jury retired to deliberate, and one hour and ten minutes later returned with verdicts of guilty against the petitioner and against his co-defendant; that the petitioner and his co-defendant were called for judgment, Mr. O'Connor made a motion for a new trial on behalf of the petitioner and his co-defendant, and also made a motion in arrest of judgment as to the petitioner and his co-defendant, and both motions were denied, whereupon the petitioner and his co-defendant were sentenced to terms of 25 years each in an institution to be designated by the Attorney General; that the petitioner did not appeal his conviction.

## XI.

That during the course of the trial petitioner and his co-defendant testified each on his own behalf.



## XII.

That at the time petitioner and his co-defendant were apprehended the co-defendant Sivyer confessed, in writing, his guilt to a United States Post Office Inspector; that in the said statement the co-defendant stated that the petitioner was likewise guilty of the offense and indicated the method of participation by petitioner in the commission of the said offense; that in the presence of the co-defendant the said United States Post Office Inspector read the co-defendant's statement to the said petitioner, and the said petitioner, after being advised that he did not have to speak, freely and voluntarily admitted that the contents of the statement given by the co-defendant were true; that during the course of the trial the said Post Office Inspector testified as to what had transpired between himself and the petitioner and the co-defendant with relation to petitioner's oral confession of guilt and the co-defendant's written confession of guilt.

## XIII.

That the petitioner has failed to sustain the burden of proving that the Trial Court and Mr. O'Connor did not adequately protect all rights of the petitioner with reference to any evidence offered or received against him.

## XIV.

That at no time during the entire proceedings before the Trial Court did the petitioner, either orally or in writing, object to having the trial together with the co-defendant.

## XV.

That the petitioner has failed to sustain the burden of proving that there was a conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## XVI.

That there was no conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## XVII.

That Mr. O'Connor, who is now deceased, gave the petitioner and his co-defendant his undivided attention and represented them in his usual able and competent manner, protecting all of their rights to which they were entitled.

## XVIII.

That petitioner was not denied the right of assistance of counsel, or the effective assistance of counsel at any time during the course of the proceedings before the Trial Court, and was then and there duly represented by counsel and given the effective assistance of counsel during the course of the proceedings before the Trial Court.

## XIX.

That the petitioner has failed to sustain the burden of proving that he was denied the right of assistance of counsel or the effective assistance of counsel for his defense at any time during the course of the proceedings before the Trial Court.

## XX.

That the Clerk of the Trial Court has maintained his minute and docket entries of all of the proceedings; that the reporter's transcript of the proceedings for the 3rd and 4th days of September, 1942, has been destroyed.

## XXI.

That petitioner, prior to his conviction in said criminal cause numbered 26543-W, had a record of felony convictions.

## CONCLUSIONS OF LAW.

## I.

That the petitioner has failed to sustain the burden of proving that there was a conflict of interests between the petitioner and his co-defendant.

## II.

That there was no conflict of interests between the petitioner and his co-defendant in the aforesaid trial before the Trial Court.

## III.

That petitioner has failed to sustain the burden of proving that he was denied his right of counsel, or the effective assistance of counsel before the Trial Court.

## IV.

That petitioner was not denied the right of assistance of counsel, or the effective assistance of counsel before the Trial Court.



## V.

That petitioner was effectively, efficiently, and ably represented by counsel during all stages of the proceedings before the Trial Court.

## VI.

That the petitioner has failed to sustain the burden of proving he was denied any of his constitutional rights before the Trial Court.

## VII.

That the petitioner was not denied any of his constitutional rights before the Trial Court.

## VIII.

That petitioner has not sustained the burden of proving he was denied due process of law before the Trial Court; that petitioner was not denied due process of law before the Trial Court.

## IX.

That there is no merit to the petition for writ of habeas corpus on file herein.

## X.

That petitioner is now in the lawful custody and control of the respondent, and is not now entitled to his discharge from the United States Penitentiary at Alcatraz, California.

Dated: April 9, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."

(Tr. 69-78.)

At the time the findings were entered the Court below entered a "Final Order", reading as follows:

"For the reasons set forth in the Findings of Fact and Conclusions of Law filed herein,

It is, therefore, now ordered, adjudged and decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and that the petition for writ of habeas corpus herein be, and the same is hereby, dismissed, and the petitioner is hereby ordered remanded to the custody and control of the respondent.

Dated: 9th April, 1951.

MICHAEL J. ROCHE,  
Chief United States District Judge."

(Tr. 79.)

From this latter order appellant now appeals to this Honorable Court (Tr. 80-84).

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### QUESTION.

Was the appellant denied the effective assistance of counsel?

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### CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

## ARGUMENT.

The appellant, with a record of felony convictions, contends, in reliance on

*Glasser v. United States*, 315 U.S. 60,

that he was denied the effective assistance of counsel because the interests of himself and his co-defendant conflicted and the same attorney was appointed to represent them both.

The basis of the alleged conflict is that appellant's co-defendant had given a statement implicating himself and appellant, and that the co-defendant took the witness stand and repeated the statement of appellant's involvement in the crime.

It is undisputed that the co-defendant gave a statement in which he confessed his guilt and involved the appellant, but the allegation of appellant that his co-defendant, who took the stand as a witness, testified against him during the trial, is not supported by the record in the habeas corpus proceedings. The reporter's notes of the trial occurring about a decade ago have been destroyed in accordance with the usual practice, and the Court below refused to accept appellant's version of what occurred at the trial.

The Court's order denying the petition for writ of habeas corpus is strengthened by the testimony of a postoffice inspector, to the effect that the appellant, shortly after his arrest, admitted that the contents of the co-defendant's statement involving him were true. This testimony was denied by the appellant, but the Court below refused to believe him.

In order to prevail the appellant is compelled to show that during the course of the trial certain things occurred as a result of the representation by his counsel of the co-defendant resulting in prejudice to him. This he has failed to do, and accordingly, his position cannot be sustained. See the following decisions of this Honorable Court:

*Danziger v. United States*, 161 F. (2d) 299, 301;

*Swope v. McDonald*, 173 F. (2d) 852, 856.

Furthermore, the Court below found, contrary to the testimony of the appellant, that he made no protest with relation to the appointment of counsel to represent him and the co-defendant. This, too, is a factor to be considered in the light of further decisions of this Honorable Court, interpreting the *Glasser* case, *supra*. See

*Johnston v. McDonald*, 157 F. (2d) 275, 276;

*Newagon v. Swope*, 183 F. (2d) 340, 341.

The Court below found, after hearing, that there was no conflict of interests between the appellant and the co-defendant during the trial before the trial Court, and that appellant had failed to sustain the burden that there was such a conflict. The Court below further found that appellant's trial counsel, now deceased, "gave the petitioner and his co-defendant his undivided attention and represented them in his usual able and competent manner, protecting all of their rights to which they were entitled". There is nothing in this record and the law applicable thereto, and more particularly the decisions of this Honor-

able Court, as aforesaid, to warrant a setting aside of these findings.

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**CONCLUSION.**

In view of the foregoing, it is respectfully urged that the order of the Court below denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,  
September 21, 1951.

CHAUNCEY TRAMUTOLO,  
United States Attorney,

JOSEPH KARESH,  
Assistant United States Attorney,  
*Attorneys for Appellee.*